IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 20776 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE M.S.SHAH
AND
HONOURABLE MR.JUSTICE SHARAD D.DAVE

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge?

==========

VIRTUAL EXPLORATION PVT.LTD. - Petitioner(s)
Versus
O.N.G.C. LTD. - Respondent(s)

==========

Appearance :
MR MIHIR JOSHI, Sr.Counsel with MS AMRITA M THAKORE for Petitioner(s) : 1,
MR KAMAL B TRIVEDI with MR RAKESH GUPTA for M/S TRIVEDI & GUPTA for Respondent(s) : 1,

==========

CORAM : HONOURABLE MR.JUSTICE M.S.SHAH
and
HONOURABLE MR.JUSTICE SHARAD D.DAVE
Date : 15/02/2006
ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE M.S.SHAH)

In this petition under Article 226 of the Constitution, the petitioner has challenged the terms of the tender issued by the respondent – The Oil &

Natural Gas Corporation Limited (“ONGC” for short) as arbitrary, unreasonable, unconscionable and against the public policy.

2. On 24.6.2005, the ONGC issued the tender notice inviting tenders for hiring of Natural Gas Compression Services at Sobhasan GGS – II for a period of two years. The last date for collection of tender documents was 25.7.2005 and the last date of seeking clarifications before the pre-bid conference was 3.8.2005 and the pre-bid conference was fixed on 5.8.2005. The tenders were to be opened on 25.8.2005.

3. The material terms of the tender which are under challenge in this petition, broadly stated, are as under :-

(i) Supplying on hire two compressors operating having minimum capacity of 1,00,000 SCMD each and one standby compressor of minimum capacity of 1,00,000 SCMD.

(ii) The original date of manufacturing the offered Natural Gas Compressor package should not be older than five years as on the date of opening of techno-commercial bid. In case brand new compressor package is not offered, the bidder must submit along with the unpriced techno-commercial bid, a

certificate from the manufacturer for manufacturing date and soundness of machine and must confirm to submit a certificate from any of the reputed third party inspection agencies named in the tender document for soundness and conformance to applicable code prior to shipment.

(iii) In case new compressor is offered, the successful bidder will have to submit necessary documents in support of it within one month from the date of LOI/NOA.

(iv) The mobilization period shall be 180 days from the date of LOI/NOA and the contract shall be for a period of two years.

4. The petitioner's case is that it has a compressor with capacity of 2,00,000 SCMD which is about six years old. The main challenge is to the condition requiring that the package shall not be older than five years. The query/objection of the petitioner as submitted in its letter dated 3.8.2005, and that is also the principal contention raised in this petition, was as under:-

> “The Original date of compressor package, if not older than 5 years is acceptable to ONGC, irrespective to the date of manufacturing date of the compressor, engine & cooler ? It is a noticeable fact that a compressor & Gas engine has life well beyond 5 years say 20 + years. Such units must be working satisfactorily in

> ONGC for several years or ONGC is scrapping the compressor packages, which are older than 5 Years ? By limiting the year of manufacturing to 5 years ONGC is needlessly increasing the cost of compression. Also it does not encourage competitive bidding as except a couple of bidders no one else has the used compressor that is not more than 5 years. Thereby giving advantage to the already existing players in this field. Also it is a national waste after five years since there is no open market for these kind of compressor packages in India. ONGC should allow compressor packages that are more than five years old but remanufactured or zero-houred by manufacturer or authorized dealer. This is a standard practice worldwide and if the manufacturer is certifying the soundness of machines after Remanufacture then ONGC should accept the same. As in similar charter hiring contracts in ONGC viz equipment more than five years / re-manufactured / zero-hour etc are acceptable based on Third Party Inspection. Then why this disparity? Kindly clarify would it be acceptable to ONGC if we offer such package?"

5. At the pre-bid conference, the ONGC's reply to the above query was as under :-

> "The date of manufacturing of the oldest machine (Compressor, Engine) in the offered natural gas compressor package shall be considered as the date of manufacturing of the offered natural gas compressor package. Rest of the para remains the same."

6. In short, the ONGC decided to proceed with the tender process on the basis of the terms and conditions already specified in the tender document and did not accept the petitioner's request to accept compressors which were more than five years old. In

view of the above stand of the ONGC, the petitioner did not submit its tender, but thereafter filed the present petition on 5.10.2005 mainly contending that by insisting that the compressor should not be more than five years old as against the normal 20 year life of the compressor, the ONGC was only increasing the cost of the contract and that too in order to suit the party which alone has the compressors as per the tender specifications.

7. In response to the Rule issued by this Court, affidavit-in-reply has been filed by Mr. Surinder Kumar Agrawal, Manager (MM) in ONGC at Mehsana mainly submitting as under :-

> "(i) Usually a compressor needs overhauling after five years and its efficiency is also substantially decreased and the possibility of stoppage and/or breakdowns increases after the compressor is put to use for about five years and besides the aforesaid aspect, the efficiency of performance of a five year old compressor would be on lower side.
>
> (ii) For the Corporation, performance, efficiency of the machine and its yield / output hold importance and value and in the overall interest of the Corporation, the said aspects are required to be given weightage than the mere life span of the machine or the cost. The condition limiting the year of manufacture to five years is justified and necessary for efficient performance.
>
> (iii) Four out of the five bidders have mentioned in the bids that they are offering two working and one standby compressor packages

having capacity of 1,00,000 SCMD and that the same will be new and will be provided as per the terms of the tender document and so far as the fifth bidder is concerned, it is noticed on preliminary verification subject to further scrutiny, that the said bidder has also stated that it has offered three compressor packages, two compressor packages of 1,00,000 SCMD each which though comparatively old, but are not older than five years i.e. they are less than five years old whereas the third one with the capacity of 100000 SCMD is a new one.

(iv) As regards the petitioner's suggestion that there can be one compressor with 2,00,000 SCMD, instead of two compressors each having capacity of 1,00,000 SCMD, the ONGC's reply is that there are about 40 wells in respect of which the services of the two compressors are to be taken / applied and therefore if all the said wells are to be connected to or regulated by a single compressor, then in the event of its mal-functioning or break-down, all the 40 wells may be adversely affected which the Corporation can ill-afford and therefore it is in its administrative interest and technical requirements that the Corporation has determined the capacity specification / requirement. Additionally, since the Corporation is required to supply gas on non-chargeable basis to the contractor for start-up of the compressor and also for its running, the capacity requirement had to be determined by taking into consideration the said aspect also coupled with the Corporation's position of being able to supply so much of gas for the said purpose.”

8. Mr. Mihir Joshi, learned counsel for the petitioner, has submitted that since the Corporation has not stated that a compressor more than five years

old cannot perform the job and that the petitioner's compressor is about six years old and each new compressor would cost more than rupees one crore, requiring a party to purchase a new compressor or a compressor which is less than five years old would only increase the cost of the contract without any corresponding gain to the ONGC. It is submitted that even in the offers made by the parties except one, they have only offered two working and one standby compressor packages which will be new, that means those parties will also have to purchase new compressors and therefore the price will be much on the higher side as compared to the price which the petitioner can offer with six year old compressor.

It is submitted that although the scope of judicial review in such matters will be limited, it is certainly open to the Court to intervene when the powers are being exercised by the authority without taking into account relevant factors and only in order to suit one party. Mr. Joshi has placed reliance on the decision of the Apex Court in Directorate of Education and Others v EDUCOMP Datamatics Ltd. and Others, (2004) 4 SCC 19 in support of the proposition that judicial review extends to interference with the terms of tender prescribing eligibility criteria when such terms are found to be arbitrary, discriminatory or biased.

9. On the other-hand Mr.K.B.Trivedi, learned counsel for the ONGC, has submitted that in the

affidavit in reply the respondent authority has given sufficient justification for the terms and conditions and particularly, the condition requiring that the compressor package should not be more than five years old. It is submitted that in a catena of decisions, the Apex Court has laid down that the terms of the invitation to tender cannot be open to the judicial scrutiny because the invitation to tender is in the realm of contract. It is submitted that the scope of judicial review is only to review the decision making process and does not extend to review of the decision of the authority determining the terms of the contract. Strong reliance is placed on the decisions of this Court in Larsen & Toubro Limited & Anr v. Gujarat State Petroleum Corporation Limited & Ors, 2000 (2) GLR 1814 and 2001 (2) GLR 934 and also on the Apex Court decision in Association of Registration Plates v. Union of India and Others, (2005) 1 SCC 679.

10. In Tata Cellular v. Union of India, reported in (1994)6 SCC 651, the Apex Court laid down the following principles in the matter of judicial review of decisions of administrative authorities in the matter of inviting tenders and awarding contracts :-

> “(1) The modern trend points to judicial restraint in administrative action.
>
> (2) The Court does not sit as a Court of Appeal, but merely reviews the manner in which the decision was made.

(3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted, it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness, (including its other facets pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

(emphasis supplied)

11. Elaborating the fourth principle laid down in Tata Cellular case, a learned Single Judge of this Court in Larsen & Toubro Ltd. & Anr., 2000 (2) GLR 1814, excluded entirely the scope of judicial review in the matter of challenge to the terms of the invitation to tender (popularly also called – the tender conditions). The observations of the learned Single Judge in paragraphs 10.3 to 10.5 of the

judgment, and particularly the following observations indicate that the learned Single Judge proceeded on the premise that principle No. (4) in The Tata Cellular case was not at all qualified by principle No. (5) to any extent whatsoever :-

> “10.4. If in the decision making process of entering into a contract by the State there is element of arbitrariness that results in violation of fundamental rights guaranteed by Art.14 of the Constitution, then the power of judicial review would extend to correcting it. It would however not extend to requiring the “State” to enter into a particular type of contract or to vary the subject of the contract. When offer is invited by the offeree, it is the offeree who sets the parameters of the offer and the offeror cannot dictate as to what the offeree should seek. The offeror has no choice in fixing the requirements of the offeree. A fortiori, the Court cannot exercise its jurisdiction to confer such choice on him and tune the requirements of the contract to suit the offeror's capacity and will. Those would be the elements that go into the constitution of a contractual relationship and will have no bearing on the aspect of arbitrariness in a decision making process by which contract is entered into. The arbitrariness that can justify Court's interference in award of contract by “State” is not the arbitrariness in determining the requirements for which the offer is invited but the one that results in discrimination against the offeror who fulfills the requirements with a valid offer, by bypassing him for no valid reason whatsoever. It is such pre-contractual situation that would make the decision to award a contract prone to challenge. Such arbitrary award of contract is bad not because of its terms but because of the manner in which it has resulted in violation of the fundamental right of a person bidding for it or due to violation of the statutory, including

procedural requirements laid down for the purpose."

(emphasis supplied)

12. While confirming the decision of the learned Single Judge turning down the challenge to the terms of the invitation to tender, in the judgment reported in **2001 (2) GLR 934**, the Letters Patent Bench of this Court did not adopt the reasoning of the learned Single Judge and preferred to base its decision on the following reasoning :-

"12.3 It is well settled principle of law that approach for judicial review is not an appeal against the administrative decision which is made here in consultation with experts. Judicial review is permissible only against decision-making process and not decision itself. This Court finds itself totally ill-equipped for want of knowledge of technical and financial intricacies in the matter of award of contract for setting up power plant, to come to a conclusion either way that the decision taking by the Managing Committee was erroneous or correct. We also do not find it to be against public interest. It is possible to project an opposite view on the financial and technical opinions formed by the experts and consequent decision taken by the Committee. But that can be no justification to upset their decision, as this Court finds the decision to have been taken objectively and bona fide. We have tried to understand the technical and financial information given to us by the parties before us, and we have tried to scrutinise the record. So far as we have understood, it is not possible for this Court with limited knowledge on the subject to come to a conclusion that the decision taken was either actuated by favouritism or was in utter disregard of public interest. We also find no force in the bald

allegation that the R.P.F. Was tailor-made to suit selection of A.B.B. Ltd.”

For taking the above view, the Division Bench was guided by the decisions of the Apex Court in Air India ltd. v. Cochin International Airport Ltd., JT 2000 (1) SC 481 = (2000) 2 SCC 617 (the State can fix its own terms of invitation to tender and it is not open to judicial scrutiny. Even when some defect is found in the decision-making process, the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene) and in Raunaq International Ltd. v. I.V.R. Construction Ltd., 1999 (1) SCC 492.

13. In **Directorate of Education and Others v. Educomp Datamatics Ltd., 2004 (4) SCC 19**, a two Judge Bench of the Apex Court relied upon the principles laid down in Tata Cellular v. Union of India, (1994) 6 SCC 651 which are already quoted hereinabove and in Air India ltd. v. Cochin International Airport Ltd., (2000) 2 SCC 617 and again in Monarch Infrastructure (P) Ltd. v. Commissioner, Ulhasnagar Municipal Corporation, (2000) 5 SCC 287 and deduced the following principles :-

“12. It has clearly been held in these decisions that the terms of the invitation to

> tender are not open to judicial scrutiny, the same being in the realm of contract. That the Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide."

14. The same controversy again arose before the Apex Court in **Association of Registration Plates v. Union of India, (2004) 5 SCC 364.** However, there was disagreement between the two learned Judges constituting the Bench. The contract was for supply of high security vehicle registration plates for motor vehicles for a period of 15 years. What was under challenge was -

(i) the relevant clause of the statutory order issued by the Central Government under the Motor Vehicles Act empowering the State Government to select one manufacturer or vendor for the entire State or for any region of the State. This was challenged as arbitrary because it allowed creation of monopoly.

(ii) the notices inviting tenders (NITs) issued by various State Governments stipulating certain conditions. The following conditions were challenged as arbitrary, discriminatory and against public interest as they were alleged to have been tailored to favour Companies having foreign collaboration :-

(a) experience of manufacturing registration plates in 3/5 countries.

(b) turnover of Rs.50 crores or so with 15 to 25 per cent thereof in the business of manufacture of registration plates in the immediately preceding year, and

(c) The contract will be for a period of 15 years (including the first two years in which all the existing vehicles will be supplied the high security registration plates) and no second bidder will be approved during currency of the contract in the State.

One learned Judge of the Supreme Court took the view that the principles of judicial review would apply to exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. The learned Judge held that the NITs under challenge inevitably meant that the eligible party would be a foreign Company getting monopoly for 15 years and all Indian Companies would be ousted even though they may be technically competent to manufacture the plates in question. The said

learned Judge accordingly struck down those conditions as wholly arbitrary and without any rational basis and also the relevant clause in the statutory order permitting creation of monopoly.

The other learned Judge did not agree with the conclusion regarding invalidity of the impugned clause of the statutory order, but thought it fit not to give detailed reasons because in any event the matter was being referred to a Larger Bench.

15. The Larger Bench of three learned Judges rendered their decision through the judgment reported in **(2005) 1 SCC 679**. Although the Larger Bench ultimately turned down the challenge made to the provisions of the Rules and the statutory orders and also the challenge to the tender conditions, the Court did not hold that judicial review is totally excluded in such cases. The Larger Bench laid down the following principles in paragraphs 38 and 43 of the said judgment :-

> "38. In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities. Unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, tender conditions are unassailable. ... .
>
> 43. Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work.

> Article 14 of the Constitution prohibits the Government from arbitrarily choosing a contractor at its will and pleasure. It has to act reasonably, fairly and in public interest in awarding contract. At the same time, no person can claim a fundamental right to carry on business with the Government. All that he can claim is that in competing for the contract, he should not be unfairly treated and discriminated, to the detriment of public interest. Undisputedly, the legal position which has been firmly established from various decisions of this Court, cited at the Bar (supra) is that government contracts are highly valuable assets and the court should be prepared to enforce standard of fairness on the Government in its dealing with tenderers and contractors.

Paras 42 and 44 of the judgment make instructive reading indicating how the Apex Court applied the above principles for reaching the conclusion in the facts of that case that "Selection of a competent contractor for assigning job of supply of a sophisticated article through an open-tender procedure, is not an act of creating monopoly, as is sought to be suggested on behalf of the petitioners. ... ... In the absence of any indication from the record that the terms and conditions were tailor-made to promote parties with foreign collaborations and to exclude indigenous manufacturers, judicial interference is uncalled for."

(emphasis supplied)

16. On an analysis of the principles laid down

in all the aforesaid decisions, the view taken by the learned Single Judge of this Court in LARSON & TOUBRO LTD., 2000 (2) GLR 1814 that in exercise of the power of judicial review, the Court can never entertain any challenge to the terms of the tender, has not been accepted in any subsequent decision of the Apex Court. In the Letters Patent Appeal against the said decision of the learned Single Judge, the Division Bench [2001 (2) GLR 934] did hold that overwhelming public interest may justify the Court's intervention even in such matters, but because of lack of knowledge of technical and financial intricacies in such matters, the Court must be slow to entertain such challenge and that the Court can interfere with the terms of the tender only where the administrative decision is found to be actuated by favouritism and in utter disregard of public interest.

Thereafter, the two Judge Bench of the Apex in Directorate of Education & Ors., (2004) 4 SCC 19 held that the Court can interfere with the terms of the tender prescribing eligibility criteria when such terms are found to be arbitrary, discriminatory or mala fide. The Court, however, added a caveat that the Government must have a free hand in setting the terms of the tender and must have reasonable play in its joints. It is entitled to pragmatic adjustments which may be called for by the particular circumstances and the Court cannot strike down the terms of the tender prescribed by the Government because the Court feels that some other terms in the

tender would have been fair, wiser and logical.

Subsequently, the three Judge Bench of the Apex Court further narrowed the scope of interference in judicial review in such matters by laying down that the tender conditions are unassailable, unless the action of tendering authority is found to be malicious and a misuse of its statutory powers. Even while laying down this principle, the Larger Bench did observe that Government contracts are highly valuable and the Courts should be prepared to enforce standard of fairness on the Governments in its dealings with tenderers and contractors. Of course, selection of a competent contractor for assigning job of supply of a sophisticated article through an open-tender procedure is not an act of creating monopoly and that judicial interference is not called for in the absence of any indication from the record that the terms and conditions were tailor-made to promote certain parties.

17. In short, the law on the subject must now be treated as having been laid down in paras 38 and 43 of the decision of the three Judge Bench of the Apex Court in Association of Registration of Plates, (2005) 1 SCC 679. Of course, the number of cases where challenge to the terms of the tender will succeed may be very few and even rare, but the principle of total exclusion of judicial review in the matter of challenge to the terms of the tender as propounded in the decision of a learned Single Judge

of this Court in Larsen & Toubro case, 2000 (2) GLR 1814 cannot be taken as laying down the correct legal position. We have thought it necessary to dwell on this issue at some length so that judicial restraint may not be misunderstood as judicial abstinence.

18. In view of the above discussion, it may safely be concluded that even where the Court finds that the terms of the tender are arbitrary or discriminatory, that finding by itself may not be sufficient to strike down the terms of tender prescribing eligibility unless the arbitrariness and discrimination are writ so large and are so gross that the Court is in a position to come to a conclusion that the action of the tendering authority in setting particular terms of the tender is malicious and a misuse of its powers. In other words, the Court can interfere with the terms of the tender only when the malice in fact is proved and a very heavy burden of proof lies on the party alleging such factual mala fides.

19. Applying the aforesaid tests, it is not possible to hold that the action of the tendering authority in specifying the terms and conditions of the tender document in the present case is malicious or amounts to misuse of its powers. The respondent authority has pointed out that out of twelve parties who collected the tender papers, five parties submitted their bids and that out of them, four bidders have mentioned that they are offering two

working and one standby compressor packages each having capacity of one lac SCMD and that the same will be new and will be provided as per the terms of the tender document. It is also stated that the fifth bidder has mentioned that it has offered three compressor packages, two compressor packages of one lac SCMD each, which are less than five years old and the third one is a new one with the required capacity.

20. Considering the explanation offered in the affidavit in reply, the Court does not find any illegality in the decision of the tendering authority in specifying the terms and conditions which are impugned in the petition. In such matters, on the question whether the authority should invite offers for compressors with less than five years of age or with longer life, this Court cannot sit in appeal over the decision of the tendering authority.

At this stage, we may also refer to the statement made by Mr. K.B. Trivedi, learned counsel for the ONGC that the terms of the tender were laid down by a committee of high ranking officials consisting of several experts.

21. At the same time, it is necessary to notice that the petitioner had submitted his objections before the respondent through his letter dated 3.8.2005 making suggestions to alter the terms of the tender and seeking clarification and the

petitioner had also submitted that insisting on compressor package of not less than five years age would unnecessarily increase the cost of the contract and would only benefit the party having such compressors. It was also pointed out that in similar charter hiring contracts in ONGC, equipments more than five years/remanufactured/zero houred by manufacturer/authorized dealer are acceptable based on third party inspection.

It would, therefore, not be unreasonable to expect that the petitioner's objections dated 3.8.2005 should have been placed before the committee which had determined the terms of the tender and provided the specifications for the compressor package. The limitations on the power of judicial review do not apply to the administrative authorities themselves. The learned counsel for the ONGC is, however, not in a position to state that the contents of the petitioner's letter dated 3.8.2005 were brought to the notice of, and considered by, the committee which had determined the terms of the tender.

22. In view of the above discussion, while dismissing the petition, it is directed that the respondent herein shall submit the petitioner's letter dated 3.8.2005 before the same committee which had determined the terms of the tender under consideration as expeditiously as possible and in any case within three weeks from today.

23. Subject to the aforesaid direction, the petition is dismissed.

Rule is discharged with no order as to costs.

(M.S.SHAH,J)

(SHARAD D.DAVE,J)

srilatha